BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIAN J. GUTIERREZ Claimant VS. **DIEBOLT LUMBER & SUPPLY, INC.** Respondent AND **HARTFORD CASUALTY INS. CO.** Insurance Carrier	)	Docket No. 1,032,056

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 27, 2007, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Clifford K. Stubbs, of Roeland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that the procedures used to test claimant for intoxication were insufficient and not reliable for the purpose of denying claimant eligibility for workers compensation benefits. Accordingly, the ALJ ordered that Dr. Bruce Buhr would continue to be claimant's authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 22, 2007, Preliminary Hearing and the exhibits, the transcript of the deposition of Jim Wright taken March 15, 2007, and the exhibits, and the transcripts of the depositions of Ai-Leng Chan taken January 23, 2007, and March 15, 2007, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that its evidence in support of an intoxication defense was insufficient. Respondent argues that all the criteria of K.S.A. 2006 Supp. 44-501(d) have been satisfied in this case and requests that the Board deny

claimant workers compensation benefits based on the evidence showing claimant tested positive for marijuana after his work-related accident.

Claimant argues that the Board does not have jurisdiction over this issue on appeal, since respondent did not assert that the ALJ exceeded his jurisdiction, as required by K.S.A. 44-551, and the issue is not one listed as jurisdictional in K.S.A. 44-534a. In the alternative, if the Board determines it has jurisdiction in this appeal, claimant asserts that respondent has not established all the requirements of K.S.A. 2006 Supp. 44-501(d).

The issues for the Board's review are:

(1) Does the Board have jurisdiction over this appeal?

(2) If so, has respondent met its burden of proof that claimant's accident and injury was contributed to by his use or consumption of marijuana, thereby making claimant ineligible for workers compensation benefits?

FINDINGS OF FACT

Claimant worked as a yard man for respondent. On June 20, 2006, he was retrieving insulation for a customer. In doing so, he stepped across a pallet, the pallet broke, and he fell about 12 feet. As he fell, he hit a truck and then fell onto the ground. He injured his head, orbital bone of his left eye, cheek, sinus cavity, left wrist, left hand, shoulders and back. He was admitted to the hospital, where he stayed for three days. While there, he was given morphine for the pain.

A urine sample was collected from claimant on June 21, 2006, for a drug abuse screen. Claimant has no memory of this sample being taken. The urine screen came back positive for cannabinoids (marijuana) and opiates. Claimant testified that he has never smoked marijuana.

Jim Wright, a registered nurse, testified that he obtained a urine sample from claimant to make sure there were no foreign substances in his system that would interfere with any medication that might be given during treatment. Nurse Wright followed his normal procedures, which entailed placing a bar code label that identified claimant as the patient on the urine cup , then putting the date and time on the label, and then initialing the label. The urine cup containing the sample would not be sealed, but the lid would be screwed onto the cup, the cup would be double bagged, and the sample would then be sent to the lab via a pneumatic tube system. Nurse Wright testified that from the time the sample was taken until it was placed into the tube to be sent to the lab, it was in his exclusive care, custody and control.

Ai-Leng Chan is a medical technologist who performed the testing on claimant's urine sample. She works in the laboratory at Wesley Medical Center (Wesley). The

laboratory has been approved and licensed by the United States Department of Health and Human Services. Ms. Chan described the chain of custody she would have followed in the laboratory. She stated that when a sample came into the lab, it would be logged into the computer by a phlebotomist or a lab technician. The sample would be in a sealed biohazard bag. In the case of a urine sample, the sample would be in a cup and would have a label on the cup identifying the patient, the test order, and the person who collected the sample. She would scan the bar code and verify that the name on the urine cup matches the name on the computer. She would then open the bag and remove the sample, reprint another label, pour the specimen into a tube, and spin the tube. After the sample has been spun, it is tested on an instrument called Dade Dimension B (Dimension). The results of the test will print out on the Dimension instrument, the result will interface into a Meditech interface, and Ms. Chan would validate the test. A copy of the results will be printed out in the area where the nurse collected the sample. The results are also kept in the computer. Throughout the entire testing period, the sample would remain in Ms. Chan's exclusive custody and control. Once the sample has been tested, it is placed in a freezer and kept for two weeks, in case a physician wanted to add more tests.

Ms. Chan said the Dimension instrument is tested every 24 hours to be sure it is properly calibrated at all times. The laboratory does not contain a gas chromatography/ mass spectroscopy machine.

At the bottom of the test results, under the Comments section, it is stated:

> Urine drug screens are performed by immunoassays; since false positive and false negative results can occur due to the sensitivities, specificities, and cutoff concentrations of the assays, results are considered presumptive and should not be used for non-medical purposes.[1]

Karl K. Rozman, Ph.D, D.A.B.T., reviewed the results of claimant's drug abuse screening at the request of respondent. His report of August 21, 2007, indicated that claimant's positive response of the immunoassay to opiates could have been due to the morphine given to him at the hospital. Regarding claimant's positive response to cannabis, Dr. Rozman stated:

> [Claimant's] positive test at a cutoff of 50 ng/ml is compatible with multiple smoking episodes during the days preceding his accident. Chronic abuse of marijuana can result in positive tests for weeks due to the prolonged half life (3-13 days) of THC which makes it difficult to pinpoint the exact time and the number of occasions of abuse based on a single urine sample providing a cutoff value only. Nevertheless, use of cannabis is strongly associated with sedation, motor incoordination and

[1] P.H. Trans. (Aug. 22, 2007), Resp. Ex. 2 at 2.

temporal distortion contributing to [claimant's] falling off the loft in the lumber yard with reasonable toxicological probability.[2]

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[3] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

---

[2] *Id.*, Resp. Ex. 1.

[3] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[4]

K.S.A. 2006 Supp. 44-501(d) states in part:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. . . . It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
>
> . . . .
>
> Marijuana matabolite[1] 15
>
> . . . .
>
> [1] Delta 9-tetrahydrocannabinol-9-carboxylic acid
>
> . . . .
>
> An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:
>
> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
>
> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
>
> (C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
>
> (D) the test was performed by a laboratory approved by the United States department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies:
>
> (E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
>
> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

[4]See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

> (3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:
>
> (A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;
>
> (B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;
>
> (C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or
>
> (D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.

The burden is placed on the respondent to defeat a workers compensation claim based on claimant's intoxication.[5]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

K.S.A. 44-534a(a)(2) provides that a disputed issue of "whether certain defenses apply" is a jurisdictional issue and subject to review by the Board on an appeal from a preliminary hearing order. The Board has held that the term "certain defenses" applies to

---

[5] See *Poole v. Earp Meat Co.*, 242 Kan. 638, Syl. ¶ 4, 750 P.2d 1000 (1998).

[6] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2006 Supp. 44-555c(k).

issues that go to the compensability of the claim. The intoxication defense contained in K.S.A. 2006 Supp. 44-501(d) makes an otherwise compensable work-related accident noncompensable when the injury was contributed to by an employee's use of certain drugs, including marijuana. Accordingly, the issue of whether claimant was intoxicated and, if so, whether claimant's injury was contributed to by his use of marijuana constitutes a "certain defense" under K.S.A. 44-534a(a)(2). As such, the Board has jurisdiction of that issue at this juncture of the proceedings.

Turning now to the merits of respondent's intoxication defense, this Board Member notes that the legislature has enacted stringent standards for the chemical testing that must be followed before the test results can be used to defeat an injured worker's claim for workers compensation benefits. Those conditions are enumerated in K.S.A. 2006 Supp. 44-501(d) and begin with the requirement that there have been probable cause to believe that the employee used, had possession of, or was impaired by the drug while working. Respondent makes no such argument but relies instead on the exception to the probable cause requirement when the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer. To satisfy this requirement, respondent presented the testimony of Jim Wright, the trauma control nurse at Wesley Medical Center. Nurse Wright testified that urine samples are collected from trauma patients in accordance with the attending physicians' orders to make sure the ordered medications are not contraindicated. With certain categories of patients, which included claimant, urine drug abuse screens are routinely performed. Nurse Wright stated that the urine test is done in the normal course of treatment for certain trauma patients for reasons related to the health and welfare of the patient. Nurse Wright said that certain pain medications are contraindicated if alcohol is detected, but Nurse Wright did not say if certain ordered medications would be contraindicated by the presence of marijuana in a patient. Nurse Wright did say claimant fit the category of a patient that mandated a Level II trauma panel urine test and that the attending physician ordered this test be performed on claimant. Furthermore, Nurse Wright said he has "the latitude to anticipate what may be appropriate to order and do preorders, but at any time I could edit those orders to fit the physician's orders."[8] Based upon this uncontradicted testimony, this Board Member finds that respondent has satisfied the requirement of K.S.A. 2006 Supp. 44-501(d)(3)(B).

Claimant, in his brief to the Board, focuses on the requirement in K.S.A. 2006 Supp. 44-501(d)(2)(E) for a "comparably reliable analytical method" if the gas chromatography-mass spectroscopy (GCMS) testing is not done. Claimant argues the testing method employed by Wesley does not rise to the statutorily required standard and no confirmatory testing was performed. Respondent counters that if Wesley's test was good enough for the doctors to render medical treatment, then it should be good enough for the courts. The ALJ relied upon the comment printed on the lab report and concluded that the testing

[8] Wright Depo. at 8.

procedures were not reliable enough to be used for purposes of the intoxication defense under K.S.A. 2006 Supp. 44-501(d)(2)(E). This Board Member agrees. The expert testimony does not specifically address the reliability of the testing procedure utilized by Wesley's laboratory and does not address whether that procedure constitutes a "comparably reliable analytical method" to GCMS.

CONCLUSION

(1) The Board has jurisdiction of this appeal.

(2) Respondent has not met its burden to prove that claimant was intoxicated and that his alleged use of marijuana contributed to his injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated August 27, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge